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IN THE

Supreme Court of the United States

Supreme Court, U. S.
FILED
JUN 1 1972
MICHAEL RODAK, JR., CLE

October Term, 1971
No. .....

JOANNE CARROLL BOWLING, SUSAN ARLENE SETTERS, VIVIAN G. FORTUNO and JOSEPH F. FERRERI,

Petitioners,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of Californin, Second Appellate District, Division Two.

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JOANNE CARROLL BOWLING, SUSAN ARLENE SETTERS, VIVIAN G. FORTUNO and JOSEPH F. FERRERI,

Petitioners,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Two.

Petitioners Joanne Carroll Bowling, Susan Arlene Setters, Vivian G. Fortuno and Joseph R. Ferreri, pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, reversing judgments of the Appellate Department of the Superior Court which in turn reversed the Municipal Court which convicted petitioners of violation of California Penal Code §647(a) (soliciting or engaging in lewd or dissolute conduct in a place open to the public) for which petitioners Bowling and Fortuno were sentenced to serve five hundred forty days in jail and fined $1,875.00, and petitioners Ferreri and Setters were sentenced to five hundred days in jail.

Proceedings Below.

The judgments of conviction were made upon a jury verdict by Judge Irwin J. Nebron of the Municipal Court of Los Angeles Judicial District, State of California, without opinion. Said judgments of conviction were reversed by the Appellate Department of the Superior Court of the State of California in a written opinion, following which the matter was certified by the Appellate Department to the Court of Appeal of the State of California, which affirmed the judgments of conviction by a written opinion on March 7, 1972. Appendix A. Following a denial of a Petition for Rehearing by the Court of Appeal, the Supreme Court of the State of California denied a Petition for Hearing and directed that the written opinion of the Court of Appeal not be published in the official Appellate Reports. Appendix B.

Jurisdiction.

The date of the judgment sought to be reviewed is March 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented.

1. Can the District Court of Appeal reverse the Court below it without having the transcript of the evidence before it when the issue involved is a "constitutionally protected dance"?

2. Where the only information concerning the facts below is referred to in the briefs of counsel, may an

Appellate Court reverse the decision below if the activity involves First Amendment Constitutional Rights?

3. Where the activity involves a "27 minute dance" may an Appellate Court reverse the Court below because they find three or four minutes thereof unacceptable as described in the City Attorney's brief?

Constitutional and Statutory Provisions Involved.

This case involves the First Amendment (and to the extent the rights protected by the First Amendment apply to the States, the Fourteenth Amendment) to the United States Constitution, California Penal Code §§311(g) and 647(a), and Rule 64, California Rules of Court.

First Amendment:

> "Congress shall make no law—abridging the freedom of speech, . . ."

Fourteenth Amendment:

> "Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws. . . ."

California Penal Code §311(g):

> " 'Obscene live conduct' means any physical human body activity whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomining, where, taken as a whole,

the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance."

Penal Code §647(a):

"647 DISORDERLY CONDUCT

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

"(a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

Rule 64. Record:

"(a) [Contents]

"(1) [WHERE THERE WAS NO TRIAL IN SUPERIOR COURT] In any case in which there was no trial in the superior court the record or transfer shall consist of the original record, briefs, all original papers, pleadings, documents, and exhibits on file in the case, any orders made by the superior court, and a copy of any opinion of the superior court."

Statement of the Case.

Petitioners (defendants below), Bowling and Fortuno, were sentenced to serve five hundred forty days in jail and fined $1,875.00, and petitioners (defendants be-

low) Ferreri and Setters, were sentenced to serve five hundred days in jail for a series of violations of California Penal Code §647(a) in that it was adjudged that petitioners Bowling and Fortuno had solicited, and petitioners Ferreri and Setters had engaged in lewd and dissolute conduct, in a place open to the public, to wit: had performed a theatrical performance or "Love Dance" on a raised stage of a tavern or beer bar located in the City of Los Angeles [Rep. Tr. pp. 9, 11-12, 17-22, 57, 61, 66, 68, 105, 107-108, 110, 121, 152, 153-156, 162-163, 168-172, 179 214-218, 223, 241-242, 412-419]. Said raised stage performances followed a prepared script in that all movements of the dancers were choreographed by an experienced choreographer, there was extensive rehearsal before presentation, the performance was re-enacted without much variation, production techniques such as lighting and stage position were considered an integral part of the performance, the performance of the "LOVE DANCE" and the progressive thematic segments thereof, were intended to and did portray the dominant theme of courtship and culmination of a love affair as conceived by the choreographer, all body movements of the dancers as well as facial expressions and musical accompaniment were intentionally staged to coincide and be consistent therewith, and the performers pantomined singing to each other, as they executed their progressive series of choreographed segments.

REASONS FOR GRANTING THE WRIT.

A. The Judgment Below Violates Petitioners' Rights Under the First and Fourteenth Amendments to the United States Constitution in That the Reviewing Court Did Not Have or Read the Evidence of This Case Involving the Constitutional Issue of Free Speech.

The First Amendment extends its mantle of protection to a "dance" (a series of "rhythmical movements of any and all parts of the body in accordance with some scheme of individual or concerted action which is expressive of emotions or ideas," 7 Encyclopaedia Brittanica, 1945, 13-14). This Court has held that the First Amendment does extend to "theatrical performances" and that such are not limited to formal and professional productions in a theatre. *Schacht v. United States,* 398 U.S. 58 (1970).

The First Amendment indeed protects the "dance" as well as the "theatrical performance" and that such lose their protection and may become the basis of a criminal conviction only upon the proof of their obscenity as that term has been defined in *Roth v. United States,* 354 U.S. 476 (1957) and in *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). *Roth v. United States, infra,* has correctly determined that the terms "lewd" and "dissolute" in California Penal Code §647(a) are identical in their meaning to the term "obscene" and that the same standards annunciated by this Court as to obscenity with regard to printed material and motion pictures are applicable to the dance and to theatrical performances.

Accordingly, since the criminal convictions of Petitioners herein were based upon their presentation of

and involvement in a "dance" or what amounted to a "theatrical performance" in that said performance embodied all the necessary and relevant elements of a dramatic presentation by portraying human emotion and ideas by means of rhythmic body movements rather than by dialogue, it was constitutionally incumbent upon the reviewing Court in this matter to make an independent examination and determination of the *entire* record of this case involving the constitutional issue of free speech in order to ensure that First Amendment Rights have not been suppressed. Such a constitutional duty was recognized by the California Supreme Court in *Zeitlin v. Arnebergh*, 59 Cal. 2d 901 (1963), and by this Court in *Roth v. United States, supra*, and in *Jacobellis v. State of Ohio*, 378 U.S. 184, 188, 190 (1964):

> "Since it is only 'obscenity" that is excluded from the constitutional protection the question whether a particular work is obscene necessarily implicates an issue of constitutional law . . . such an issue, we think, must ultimately be decided by this court."

Further, as Mr. Justice Harlan stated in *Roth v. United States, supra*, at 497-498:

> ". . . a reviewing court must determine for *itself* whether the attached expression is suppressible within constitutional standards . . ."

As was submitted by petitioners herein in their Petition for Hearing to the California Supreme Court, in this matter, at pages 3 and 4 of that Petition, the Court of Appeal of the State of California, Second Appellate District, completely disregarded and declined to follow both *Rule 64, California Rules of Court* (re-

quiring the presence of the entire record before the Court of Appeal), *stare decisis* and the basic teachings of this Court in *Roth v. United States, supra,* and in *Jacobellis v. Ohio, supra;* and of the California Supreme Court in *Zeitlin v. Arnebergh, supra.* For the Court of Appeal rendered its decision in the instant matter without having before it, nor considering, in any manner whatsoever, the six volume Reporter's Transcript of a five and a half week trial, as well as the numerous exhibits in the instant case (including a film of the performance in question, made contemporaneously with the jury's view of said performance), all of which remained in the files of the Appellate Department of the Superior Court, for the County of Los Angeles, and which were never requested by nor transferred to the Court of Appeal at any time.

Petitioners respectfully submit that without such before it, the Court of Appeal could not and did not make an independent examination of the entire record and could not and did not determine for itself whether petitioners' expression was constitutionally suppressible.

Conclusion.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

The People of the State of California, Plaintiff and Respondent, vs. Joanne Carroll Bowling, et al., Defendants and Appellants. March 7, 1972, 2d Crim. No. 21296.

APPEALS from judgments of the Municipal Court for the Los Angeles Judicial District of Los Angeles County. Affirmed.

Harrison W. Hertzberg, Esq., for Appellants.

Roger Arnebergh, City Attorney, by Ward G. McConnell, Deputy City Attorney, for Respondent.

This is an appeal on transfer from the Appellate Department of the Superior Court of Los Angeles County under Rule 62(a). The appellate department certified the matter on its own motion pursuant to Rule 63(a).

Appellants were convicted in a jury trial of violations of Penal Code section 647(a).

The single question presented is whether the conviction can stand in light of the decision of our Supreme Court in *Barrows v. Municipal Court*, 1 Cal. 3d 821.

The essential facts are not in dispute.

On approximately 5 separate occasions during the months of September, October and November, 1970, police officers of the City of Los Angeles visited the "Bottoms Up" Bar. On each occasion they observed what was described by a hawker at the door as a "live sex show." The bar charged $5.00 for admission.

The "show" consisted of appellants Ferreri (a man) and Setters (a woman) while on a raised stage, disrobing each other, caressing each other's body, and then, while lying on the stage, engaging in an act of sexual intercourse. While this activity, which lasted about 25 minutes overall, was going on, background music was provided by appellant Bowling who played several selections from a Juke Box.

Thus, to borrow a line from a popular song of the recent past, in this case it seems "they've gone about as far as they can go" in testing the limits of legally protected conduct.

Appellants' claim to First Amendment protection and thus *Barrows'* protection for their "theatrical performance" is premised on the fact that prior to engaging in the act of sexual intercourse they went through a series of moves and gestures which they euphemistically refer to as a "dance". Reduced to its barest (no pun intended) essentials, this so-called "dance" was nothing more than erotic movements leading up to and culminating in the act of intercourse.

The fact that two persons would engage in the spectacle of actually performing sexual intercourse on a stage in a bar in the presence of curious onlookers who paid $5.00 for the privilege of watching would be hard to believe but for the frank admission of the appellants.

It cannot be seriously argued but that this was lewd conduct in a public place and thus within the definition of the precise language of section 647(a) of the Penal Code.

Our inquiry cannot end here for the reason that in *Barrows* our Supreme Court discerned an underlying

legislative intent to exempt "theatrical performances" from the ambit of section 647(a).

In *Barrows* the court was confronted with the prosecution of the director, producer and actors in a play performed in a theater, which play involved at one point, a simulated sex act. The court's basic premise there was that a play is a form of expression which enjoys First Amendment protection similar to other forms of communication media.

The court in *Barrows,* at page 826, concluded that ". . . first, the basic purpose of section 647 is to punish the crime of vagrancy in its various *overt* aspects; second, nothing in the legislative history of the section indicates that it was intended to apply to activities, such as theatrical performances, which are prima facie within the ambit of First Amendment protection." (Emphasis added.)

Theatrical is defined by Webster's Seventh New Collegiate Dictionary as "(1) of or relating to the theatre or the presentation of plays, (2) marked by pretense or artificiality of emotion."

Performance is defined as "(3) the action of representing a character in a play."

An act of intercourse even though performed on a stage and preceded by preliminary erotic caressing, however artfully done, does not appear to us to possess any of the indicia of a "theatrical performance."

In the case of *People v. Natividad,* 2d Crim. No. 20043, an unpublished opinion of the Court of Appeal, Second Appellate District, filed October 27, 1971, this court dealt with a conviction of two defendants for violating section 647(a) on the basis that they had participated in a simulated act of sexual intercourse

and oral copulation. There, as here, the acts were performed on a stage in a bar in front of patrons who had paid an admission fee. Mr. Justice Allport, writing for a unanimous court, stated: "While some might argue that the conduct involved amounted to a 'dance' under the definition of such in *In re Giannini, supra,* 69 Cal.2d at 568, this court prefers to categorize it as an exhibition calculated to arouse latent sexual desires and release the inhibitions of the viewers rather than a 'mode of expressing emotion and dramatic feeling' by the performer. In our opinion the conduct of defendant is not embodied in the concepts of the freedoms of speech or communication of ideas envisioned by the framers of the Constitution, nor can it, by being dignified as either a dance or theatrical performance, be extended the protection afforded by the First Amendment under a doctrine of liberal construction. On the contrary, we conclude that the 'performance' of this defendant was activity intended to be condemned by the Legislature in enacting Penal Code section 647 and related statutes and utterly without redeeming social importance."

In the landmark decision of *Roth v. United States,* 354 U.S. 476, at page 512, Mr. Justice Douglas, a most ardent and articulate advocate of giving broad sweep to the First Amendment, stated ". . . there is nothing in the Constitution which forbids Congress from using its power . . . to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct."

This theme is repeated in *Barrows* where the court at page 830, says "Our holding here does not suggest that acts which are independently prohibited by law

may be consummated without sanction on the stage merely because they occur during the course of a theatrical play. . . . *Giannini* [*In re Giannini*, 69 Cal. 2d 563] makes it clear that 'acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, *losing that protection only if found to be obscene*.'" (Emphasis added.) (Also see *In re Panchot*, 70 Cal. 2d 105; *People v. Noroff*, 67 Cal. 2d 791, where the court found sexual activity to be the critical factor in determining whether photographs were obscene.)

For the purposes of section 647(a), "obscene" and "lewd" are synonymous. (*Giannini, supra.*)

In sum, the *Barrows* majority was concerned with the expression of ideas and found that the Legislature did not intend to make section 647(a) applicable in that area.

We feel confident that the *Barrows* majority did not foresee, nor did it intend, that its language would be seized upon to shield from prosecution the blatantly lewd exhibition which occurred in the "Bottoms Up" Bar. Nor do we find any such intent on the part of the Legislature.

In *Barrows* the court found support for its assessment of the legislative intent underlying section 647(a) in the provisions of section 290 of the Penal Code which requires registration of persons convicted of section 647(a) but not of those persons convicted of violating the obscenity laws.

Under the circumstances of the case now engaging our attention we are persuaded by the logic of Mr.

Justice Burke in his dissent in *Barrows* to the effect that the application of section 290 to these appellants is a matter for another forum and another day and should not serve as a reason for exempting their conduct from the clear prohibition of section 647(a).

In view of our holding it is unnecessary to discuss in detail the court's instructions to the jury which appellants contend were in error.

The questioned instructions[1] were addressed to the subject of a "theatrical performance" and were more favorable to appellants than required by the law. Thus appellants cannot claim prejudicial error.

The judgments are affirmed.

CERTIFIED FOR PUBLICATION.

Compton, *J.*

We concur:

Herndon, *Acting P. J.*

Fleming, *J.*

---

[1]"If you find that the activities of the defendants herein were in fact a live theatrical performance, no part of which may be separated or removed without destroying the dominant theme, and if you find that the theatrical performance was not obscene, as that term is used in these instructions, you must find the defendants not guilty.

"However, if you find that the activities of the defendant herein were in fact a live theatrical performance, no part of which may be separated or removed without destroying the dominant theme, and further, if you find that the theatrical performance was obscene, as that term is used in these instructions, then you must find the defendants guilty."

APPENDIX B.

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 2, Crim. No. 21296.

In the Supreme Court of the State of California, in Bank.

People v. Bowling (and 13 other consolidated cases).

Filed: May 4, 1972.

Appellants' petition for hearing DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeals, filed March 7, 1972 and appearing in 23 Cal. App. 3rd 1021, for the reason it cites an unpublished opinion. (Cal. Const., Art., VI, Section 14; Rule 976, Cal. Rules of Court.)

McComb, J., and Peters, J., do not concur in the order for non-publication.

/s/ Wright
Chief Justice

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STATEMENT OF THE CASE

The Petitioners were convicted of violating subdivision (a) of Section 647 of the Penal Code of the State of California, which provides as follows:

"647 Disorderly Conduct

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

1.

(a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

Subsequent to being sentenced the Petitioners appealed to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. The Appellate Department reversed in a written opinion on the strength of an opinion of the California Supreme Court in Barrows v. Municipal Court (1970) 1 Cal.3d 821, which held that Section 647(a) was an inappropriate charge where the lewd conduct occurred as part of a theatrical performance.

Upon petition of Respondent herein, the Appellate Department certified the cause to the District Court of Appeal pursuant to Rule 63(a) of the California Rules of Court. The order certifying the cause presented two questions to the Court of Appeal, whether Barrows v. Municipal Court, supra, prohibited prosecution under Penal Code Section 647(a) of dancers who participate

in a dance found to be hard-core obscenity because of the participation by them in an actual act of sexual intercourse as an integral part of said dance, and whether Barrows v. Municipal Court, supra, represented the present thinking of the higher appellate courts of California.

The District Court of Appeal, after argument, affirmed the judgments of convictions, holding in essence that the conduct of petitioners did come within the type of conduct prohibited in Penal Code Section 647(a), and did not factually come within the meaning of "theatrical performance" as used in Barrows v. Municipal Court, supra, and In re Giannini, 69 Cal.2d 563, 568.

Petitioners then petitioned the California Supreme Court for a hearing, wherein the alleged violation of Rule 64 of the California Rules of Court by the Court of Appeal was raised.

The California Supreme Court denied a hearing, which had the effect of affirming the opinion of the Court of Appeals opinion affirming the judgments of conviction. However, the California Supreme Court

ordered that the opinion of the Court of Appeal not be published, for the reason that said opinion cited an unpublished opinion. (Said opinion is nevertheless published as an appendix to Hern v. Short, ___ F. Supp. ___ [U.S.D.C. S.D. Tex. 1972, HANNAY].)

STATEMENT OF THE EVIDENCE

On September 10, 1970, Los Angeles Police Officer Douglas Monteith entered "The Bottoms Up" Bar at 5015 Melrose in the City of Los Angeles (R.T. p. 11, lines 14-22). Appellant Bowling stated, "We're having a live sex show on stage tonight. There will be a $5.00 admission fee." (R.T. p. 12, lines 14-15). Appellant Fortuno was behind the bar serving drinks (R.T. p. 13, lines 26-27).

A nude dancer was on the stage for approximately 35 minutes (R.T. p. 14, lines 6-7). When the dancer left, appellants Ferreri and Setters walked around in front of the bar and went up on the stage (R.T. p. 17, lines 10-11). Appellant Bowling selected a song from the jukebox as Ferreri

and Setters started to dance (R.T. p. 17, lines 16-20).

They removed each other's robe (R.T. p. 17, lines 22-24). They danced facing each other, caressing each other's body in the area of the thighs and the buttocks. At the end of four records they thrust their pubic areas towards one another and began moving their bodies (R.T. p. 18, lines 1-21).

Ferreri spread the robes in the middle of the stage. Setters laid down on the stage, moving her body to and fro and up and down. She motioned to Ferreri to come to her (R.T. p. 19, lines 5-26).

Ferreri laid on his side along Setters and began to fondle and caress her (R.T. p. 19, line 28 to p. 20, line 6). Ferreri took a position between the spread legs of Setters. He lowed his pubic area into Setters' pubic area and they moved their bodies up and down.

Setters reached down with her right hand and grasped Ferreri's erected penis and placed it in her vagina (R.T. p. 20, lines 20-24). There was actual penetration

of the penis into the vagina. The act of sexual intercourse lasted approximately 25 seconds (R.T. p. 21, lines 2-26). The music stopped playing and the appellants ceased their activity, put on their robes and left the stage (R.T. p. 21, line 20 - p. 22, line 2).

During the entire performance Bowling was in front of the jukebox making various selections (R.T. p. 22, lines 5-14).

On September 12, 1970, Monteith visited "The Bottoms Up". Ferreri and Setters were on the stage nude (R.T. p. 154, lines 4-5). The performance was basically the same as on the evening of Sept. 10 (R.T. p. 155, lines 6-28).

On October 10, 1970, Officer Pelch entered "The Bottoms Up". Fortuno asked him if he was there to view the performance (R.T. p. 170, lines 8-12). Bowling was making selections at the jukebox. As Ferreri and Setters performed in the nude his penis was in contact with her vaginal area (R.T. p. 171, line 9 - p. 172, line 13). They simulated an act of sexual intercourse (R.T. p. 206, lines 8-9).

On October 22, 1970, Officer Kuster entered "The Bottoms Up" at 9:30 p.m. Fortuno was at the entrance (R.T. p. 215, line 25). Ferreri and Setters, both nude, had their private parts pressed together and they were moving in a circular motion. Setters lay on her back and spread her legs. Ferreri took a position between her legs and once again placed his private parts against hers and they moved in a to and fro circular motion for approximately five minutes (R.T. p. 217, lines 5-26).

On November 14, 1970, Officer Kellerman went to "The Bottoms Up" (R.T. p. 412, line 23). Ferreri and Setters removed their robes. They were wearing G-strings. After dancing for several minutes, they removed the G-strings. They danced nude for 10 minutes during which their private parts were touching, they embraced and they were rubbing their bodies together (R.T. p. 416, lines 1-11).

Ferreri lay on top of Setters. Setters' legs were raised and her feet were on the upper back of Ferreri. They simulated sexual intercourse rubbing their private parts together in a rocking manner.

Ferreri reached down with his right hand and inserted his penis into Setters' vagina. The act of sexual intercourse lasted for approximately four minutes after which time Ferreri and Setters put on their robes and left (R.T. p. 417, lines 3-19).

Donald Radesky testified regarding a survey to ascertain the contemporary community standards of California (R.T. p. 446, lines 2-3). Two-thousand-five-hundred (2500) persons were contacted. One-thousand-eight-hundred (1800) answered questionnaires (R.T. p. 447, lines 7-10).

Radesky had the opinion that the conduct of appellants appealed to prurient interest (R.T. p. 585, line 25). The conduct went substantially beyond the customary limits of candor in description and representation (R.T. p. 586, lines 5-10). The predominant theme taking the performance as a whole is sex (R.T. p. 610, lines 23-24). As the "dance" progressed it became a vehicle to the ultimate culmination in an act of sexual intercourse. The culmination of this particular performance wiped out any redeeming social importance that it would have had at the beginning of

the "dance" (R.T. p. 642, lines 19-28; p. 543, line 3).

Appellant Ferreri testified that it was not necessary to have an act of sexual intercourse on stage in order to portray the "love of Ferreri and Setters (R.T. p. 122, lines 9-15). The purpose of the performance was to show the culmination of love between two people and the love and the feeling that Ferreri and Setters had for each other which culminated in an act of making love (R.T. p. 143, lines 9-13). Ferreri admitted that on some dates actual penetration took place (R.T. p. 123, lines 6-9).

James Kerans, a college professor, believed the performance had redeeming social value in that any dance that seriously reveals the meaning of life has a significant social factor (R.T. p. 154, lines 14-17). The entire exhibition was a progression to the final act of intercourse (R.T. p. 182, lines 4-6).

Martin Blinder believed the performance was primarily a dance display of the physical aspects of human love. It is an appeal to the fantasy of the person viewing it.

In effect, it attempts to create a feeling of physical love (R.T. p. 314, lines 22-26).

In Blinder's opinion it is possible to have sexual intercourse appeal to prurient interest (R.T. p. 322, line 3 - p. 325, line 3; p. 327, line 12). Sexual intercourse by two live performers on a public stage before an audience of normal average persons would bring an erotic response (R.T. p. 331, lines 5-6). If a person in the audience is normal, then acts of sexual intercourse would not be to a prurient appeal (R.T. p. 331, lines 17-21).

Blinder found "social redeeming value" in the performance in that it was a sexual outlet for those who have no others. There is social value because people pay money to get in. Some people may become erotically aroused and therefore they have a richer sexual life (R.T. p. 362, line 14).

Robert Wagner testified on rebuttal that one had to take the performance as a whole to consider it obscene (R.T. p. 544, lines 15-16). Patrons contribute to the appellants' conduct by watching. If their sole sexual outlet is just looking then

they are voyeurs (R.T. p. 546, lines 1-9).

The people putting on the sex act are exhibiting themselves in public. This partial sexual instinct in the role is exhibitionism. The average person might not be able to be an exhibitionist. Some of the male patrons might masturbate. The observer of the performance is bound to have some sexual stimulation (R.T. p. 546, lines 10-28).

There is sexual stimulation in looking at a "forbidden sex act". Such performance used to be a come-on in a house of prostitution. Men, after seeing the performance, would get their prostitutes and pay them money. Men in a bar have no such release. They are just voyeurs (R.T. p. 547, lines 1-12).

The men are participating in a mass sex act. They are attending an orgy merely as voyeurs. The only time this would have value would be in a house of prostitution where the men would get immediate and complete sex experience which would be psychologically normal (R.T. p. 549, lines 1-2).

The women in the performance are selling sex in public which is a very narrow step from becoming a prostitute (R.T. p. 550, lines 9-10). Wagner would classify the participants as prostitutes.

I

CERTIORARI SHOULD NOT BE GRANTED BECAUSE PETITIONERS HAVE PRESENTED NO SUBSTANTIAL FEDERAL QUESTION BY MERELY ALLEGING THAT THE CALIFORNIA COURT OF APPEAL DID NOT ADHERE TO THE CALIFORNIA RULES OF COURT

Petitioners urge this Court to review a conviction in a state court based solely on whether a state statute was properly applied. The allegations of Petitioners, that the Court of Appeal did not adhere to Rule 64 of the California Rules of Court hardly presents a Federal question, and this is made even more so clear by the denial of a hearing by the California Supreme Court, which had presented to it Petitioners' allegations.

Respondent's position is not aided by their adherence to the proposition that their conduct constituted a "theatrical

performance", thus bringing it within the prima facie protection of the First Amendment of the Constitution of the United States (Schact v. United States, 398 U.S. 58 [1970]), for such contention was factually rejected by the Court of Appeal and the California Supreme Court.

II

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY PETITIONERS' CLAIM THAT THE TRANSCRIPT WAS NOT TRANSMITTED TO THE COURT OF APPEAL

It should be noted that no facts have been established with regard to whether or not the transcript was transmitted pursuant to California Rules of Court, No. 64, there merely exists Petitioners' claim that it was not transmitted. Respondent questions what result could possibly be obtained by granting the petition for writ of certiorari, other than returning the case to the state court for determination of the claim.

Respondent submits that even if it were proven the transcript was not transmitted

physically one city block, from the building housing the Appellate Department to the building housing the Court of Appeal, such would not constitute failure of the Court of Appeal to reach a determination, for itself, of the obscenity of Petitioners' conduct. The opinion of the Court of Appeal makes clear that the court did determine for itself that the conduct was obscene and not constitutionally protected, as required by Zeitlin v. Arnebergh, 59 Cal.2d 901, Roth v. United States, 354 U.S. 476, and Jacobellis v. Ohio, 378 U.S. 184.

CONCLUSION

As can be seen from the STATEMENT OF THE EVIDENCE herein, this case presents a record of a complete trial. The case was tried on an obscenity theory under In re Giannini, 69 Cal.2d 563, and on the theory that the conduct was legally, under the First Amendment, a "theatrical performance" under Schact v. United States, supra. The "matter" was live sexual conduct, an area relatively unexplored by the courts compared to memorialized matter such as books,

films and magazines. The conduct was practically the ultimate obtainable. The transcript in large part consists of expert testimony on all elements of obscenity, prurient interest, contemporary community standards, and social value, including testimony of a psychiatrist, with many years experience in treating mentally disordered sex offenders, which dealt with the social effects of obscenity. In a case fairly bulging with potential and possible federal questions, petitioners have chosen to claim error by alleging that there was less than strict adherence to a court rule dealing with the preparation and transmittal of the record from one court to another.

No federal question is presented by petitioner's claim of error, and the petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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